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No. 88-1477

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

THE ABSENTEE SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, DANIEL LITTLE AXE GOVERNOR,

Petitioner,

vs.

THE STATE OF KANSAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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29 pp

QUESTIONS PRESENTED

On April 18, 1865, President Andrew Johnson issued a land patent to Thomas Johnson and his heirs. Said patent was issued pursuant to the 2nd and 6th Articles of the Treaty of May 10, 1854 (10 Stat. 1053) and at the request of the elected leadership of the Shawnee Tribe of Indians. The validity of the land patent is now questioned.

1. Do footnotes 23 and 24 of *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) present an issue which should be addressed in this case?

2. Does the Treaty of May 10, 1854 (10 Stat. 1053) contain ambiguities which would invalidate the land patent of April 18, 1865?

3. Do prior Court decisions require that the land patent of April 18, 1865 be invalidated?

4. Does this case present justifiable questions concerning the interpretation of 43 U.S.C. §1152, *repealed by* Act of October 21, 1976, 90 Stat. 2792?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The facts of this case were established at the district court. In respondent's motion for partial summary judgment 28 numbered paragraphs of uncontroverted facts, supported by historical documents, the treaty, case precedent, Acts of Congress and historical treatises were presented to the district court. Petitioner's only response to these facts was contained in a footnote to their district court brief in opposition to respondent's motion, which states in part, "Plaintiff's position is such background material is essentially irrelevant and legally immaterial (though admittedly quite interesting) to the issues of this case."

The facts of this case have not been adequately addressed in the petition. The facts necessary for proper consideration of the issues follow.

The Rev. Thomas Johnson served as a Methodist missionary to the Shawnee Indians in Kansas for twenty-six years.

In 1830, Rev. Johnson opened a Methodist mission and school in what today is known as Wyandotte County, Kansas.

On June 20, 1838, the Commissioner for Indian Affairs, C. A. Harris, wrote Rev. Johnson agreeing, on behalf of the United States Government, to cooperate with the Missionary Society of the Methodist Episcopal Church, in the construction and operation of a Indian manual labor school.

On October 2, 1839, Rev. Johnson was appointed superintendent of the Indian Mission district (encompassing the Shawnee Indians in Kansas) by the Missouri Conference of the Methodist Episcopal Church. He served in that post until October, 1841, when ill health forced his retirement.

On October 29, 1839, the Shawnee Methodist Mission and Indian Manual Labor School was opened for classes. The location of the mission and school was selected by Rev. Johnson and Indian Agent Richard Cummins. Said location is in what is today known as Johnson County, Kansas, with a current survey description of: "the southwest quarter of section three, township 12 south, range 25 east of the 6th Principal Meridian."

On May 1, 1844, the Methodist Episcopal Church divided over the issue of slavery. Resolutions were passed by the Ninth Delegate General Conference, meeting in New York City, separating the church into the North, and South.

The Shawnee Methodist Mission and Indian Manual Labor School fell within the boundary of the Methodist Episcopal Church South.

In the Fall of 1847, Rev. Johnson returned to the Indian Manual Labor School as superintendent.

On March 3, 1853, the Congress of the United States authorized the President to enter into negotiations with the Indian tribes west of the states of Missouri and Iowa for the purpose of ". . . securing the consent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indians in whole or in part to said lands; . . ."

In the Spring of 1854, a Shawnee tribal delegation commenced negotiations with the Commissioner of Indian Affairs, Washington, D. C. The negotiations extended over a two-week period. Various offers and counter offers by both parties were extended.

On May 10, 1854, the above-mentioned parties agreed upon the "Treaty of May 10, 1854," (10 Stat. 1053). Said treaty was ratified by the Senate on August 2, 1854, with amendments. Said amendments were agreed to by the Shawnee Indians on August 21, 1854. The treaty in its entirety being approved by the Shawnee Indians in full council on September 28, 1854, and was proclaimed by the President on November 2, 1854.

The provisions of the above-mentioned treaty include the following:

> Article 1. *The Shawnee tribe of Indians hereby cede and convey to the United States,* all the tract of country lying west of the State of Missouri, which

was designated and set apart for the Shawnees in fulfillment of, and pursuant to, the second and third articles of a convention made between William Clark, Superintendent of Indian Affairs, and the chiefs and headmen of the Shawnee nation of Indians, at St. Louis, on the seventh day of November, one thousand eight hundred and twenty-five, which said tract was conveyed to said tribe, (subject to the right secured by the second article of the treaty made at Wapaghkoneta, on the eighth day of August, one thousand eight hundred and thirty-one,) by John Tyler, President of the United States, by deed bearing date the eleventh day of May, one thousand eight hundred and forty-four—

Article 2. The United States hereby cede to the Shawnee Indians two hundred thousand acres of land to be selected between the Missouri State line, and a line parallel thereto, and west of the same thirty miles distant; which parallel line shall be drawn from the Kansas River, to the southern boundary line of the country herein ceded; . . . *Of the lands lying east of the parallel line aforesaid, there shall first be set apart to the Missionary Society of the Methodist Episcopal Church South, to include the improvements of the Indian Manual Labor School, three sections of land;* . . . All the land selected, as herein provided, west of said parallel line, and that set apart to the respective societies for schools, and to the churches before named, shall be considered as part of the two hundred thousand acres reserved by the Shawnees. . . . After all the Shawnees, and other persons herein provided for, shall have received their shares of the two hundred thousand acres of land reserved, it is anticipated that there

will still be a residue; . . . *It is agreed that* all the tracts of land, in this article assigned, or provided to be *assigned or selected, shall be assigned and selected according to the legal subdivisions of United States lands, and according to the laws of the United States respecting the entry of public lands, so far as said laws are applicable; and no portion of this instrument shall be so construed as to nullify or impair this stipulation. And the said Indians hereby cede, relinquish, and convey to the United States, all tracts or parcels of land which may be sold, or are required to be sold in pursuance of any article of this instrument.*

Article 6. The grants of land above made to missionary societies and churches, shall be subject to these conditions: *The grant to the Missionary Society of the Methodist Episcopal Church South, at the Indian Manual Labor School, shall be confirmed to said Society, or to such person or persons as may be designated by it, by patent, from the President of the United States, upon the allowance to the Shawnees, by said society, of ten thousand dollars, to be applied to the education of their youth; which it has agreed to make.* The grants for the schools established by the Baptists and Friends, shall be held by their respective Boards of Missions, so long as those schools shall be kept by them,—when no longer used for such purpose by said Boards, the lands, with the improvements, shall, under the direction of the President, be sold at public sale, to the highest bidder, upon such terms as he may prescribe, the proceeds to be applied by the Shawnees to such general beneficial and charitable purposes as they may wish: *Provided,* That the improvements

shall be valued, and the valuation deducted from the proceeds of sale, and returned to said Boards respectively. [10 Stat. 1053.] (Emphasis supplied.)

On March 5, 1855, the Commissioner of Indian Affairs, on behalf of the Shawnee Indians, reached an agreement with the Missionary Society of the Methodist Episcopal Church South. The Society agreed to board, clothe, and educate any number of Shawnee children not exceeding eighty, between seven and seventeen years, at the Ft. Leavenworth Manual Labor School, thenceforth to be known as the Shawnee Manual Labor School. In return for which, the Commissioner agreed to pay, per annum, quarterly payments of $5,000 in money, and to credit the Society with $1,000 per annum up to $10,000 which the Missionary Society had agreed to pay for the three sections of land pursuant to the treaty of May 10, 1854. At the liquidation of ten thousand dollars, the number of scholars were to be reduced to such number as $75 per student would consume the $5,000. The Department reserved the right to annul the agreement whenever the interest of the Indians required it. If the school was closed prior to the full ten-year period, the unliquidated balance of the ten thousand dollars was to be adjusted between the parties upon principles of right and equity. Effective date of contract was October 1, 1854.

On April 26, 1856, an agreement was reached between the Missionary Society of the Methodist Episcopal Church South and Rev. Johnson. By the agreement, the Society gave to Rev. Johnson, his heirs, executors, administrators, or assignees, one of the three sections of land the Society had received pursuant to the treaty of May 10, 1854. In addition, a second section of land obtained pursuant to

the treaty of May 10, 1854, was granted to Rev. Johnson, his heirs, executors, administrators, and assignees, in return for which he was to assume the Society's obligation to the Government of $10,000. The Society reserved to itself one section of land containing the school buildings. By this agreement, Johnson and his heirs received all of the southwest quarter of section three lying north of territorial road, which is today designated Mission Road in Shawnee Mission, Kansas.

On November 2, 1857, Jacob Thompson, Secretary of the Interior, approved the designation of the three sections of land by the Missionary Society of Methodist Episcopal Church South and Thomas Johnson which included all of the southwest quarter of section three, township twelve, range twenty-five east of the Sixth Principal Meridian, which is the subject matter of this litigation.

On November 19, 1857, pursuant to the Treaty and by order of the President, those lands not selected by individual members of the Shawnee Nation or withheld on behalf of the Absentee Tribe of the Shawnee Indians, were thrown open for purchase and redemption.

On April 19, 1861, at the annual meeting of Bishops and Missionary Board of the Methodist Episcopal Church South, Nashville, Tennessee, Nathan Scaritt presented the proposition of Thomas Johnson respecting the purchase of the Board's interest in Shawnee Mission. The Board accepted the proposal, agreeing to transfer its interest and title to said property to Thomas Johnson upon the terms stated by him in his offer to the Board. By this resolution, the Missionary Society conveyed its remaining interest in the southwest quarter of section three to Johnson and his heirs, thus bringing the total quarter section under his equitable title.

On October 6, 1862, Rev. Johnson was informed the Government of the United States desired to suspend its contractual relationship with the Missionary Society of the Methodist Episcopal Church South and, thus, pursuant to their agreement of March 1, 1855, was annulling its contract. In effect, the School was closed.

By letter to William P. Dole, Commissioner of Indian Affairs, Department of the Interior, dated October 6, 1862, Rev. Johnson stated he had no objection to the suspension of the contract. In addition, he submitted an accounting of the School's finances in which he submitted final proof he was the sole owner of the three sections of land granted to the Missionary Society, pursuant to agreements between Johnson and the Missionary Society of the Methodist Episcopal Church South. He presented proof in the form of five documents and requested a patent to issue for the land.

The school had been open for eight years, from October 1, 1854, to September 30, 1862, pursuant to the Missionary Society's contract with the Government, made in accordance with the Treaty of 1854. The Government had paid the Society $32,000 in money for six and one-half years, leaving a balance of $7,500. However, the Society still owed $2,000 on the $10,000 for the reservation of the land. Deducting this from the balance due would leave $5,500 to be paid by the Government.

On March 18, 1864, a new treaty was negotiated with the Shawnee Indians under the direction of the Secretary of the Interior. The new treaty would have nullified the treaty of 1854 and contracts provided with the Methodist Episcopal Church South. However, this treaty was never ratified by the Senate. Furthermore, under the

new treaty, the Mission lands granted under the Treaty of 1854 would be offered for public sale and an equal distribution of the proceeds would be made between the Government and the Shawnee Indians. The fifth article of the above-mentioned treaty stated that:

> Article 5th. The contract entered into by George W. Manypenny Commissioner of Indian Affairs, and E. W. Sehon who assumed to act in the name and on behalf of the Missionary Society of the Methodist Episcopal Church South, on the 5th day of March 1855 being one of great hardship as to the Shawnees, and the said Society having engaged in the present rebellion against the laws and authority of the United States before the expiration of said contract and thereby rendered a compliance with its stipulations impossible, the said Contract is hereby declared forfeited. Nevertheless if the Secretary of the Interior shall be satisfied that under color of said contract any loyal citizen of the United States has conducted a school and furnished the means for clothing, boarding, and educating of the children of the tribe at the Shawnee Manual Labor School that he shall, upon the application of such citizen if made within one year after the ratification of this treaty, cause an account to be taken of the number of said children, thus clothed boarded and instructed, during each year from the first day of October 1854, to the close of said school on the 30th day of September 1862; and that he shall also have an account taken of the aggregate sum of money which has been paid to or received by such claimant for his services and expenditures: and the annual and aggregate value of the rents and profits of the said land and improvements received and enjoyed by him

during such period. And should said Secretary determine that the said claimant has not been fully and fairly paid, he is hereby authorized to pay him any balance thus found to be due out of any fund now or hereafter in the hands of the Government to the credit of the Shawnee Indians not otherwise appropriated. Provided, that not more than one hundred dollars shall be allowed for each child for the ordinary Scholastic year. In order to ascertain the facts and fairly adjust said accounts the Secretary of the Interior may receive or cause to be taken the testimony of the parties interested and residents in the vicinity of the school.

And the said Missionary Society of the Methodist Episcopal Church South, having neglected to pay for said three sections of land, and having thereby and for the same reason before stated as affecting the validity of the contract aforesaid forfeited all claim or right to any legal or equitable interest in or to the said three sections of land, the provisions of the treaty of May 10, 1854 are hereby abrogated and declared null and void. And the Secretary of the Interior shall sell said lands upon such terms and in such quantities as he may deem best for the interest of the tribes; and upon the payment of the purchase money a patent in fee simple shall issue to the purchaser his heirs or assigns.

On January 2, 1865, the Rev. Thomas Johnson was murdered.

On January 17, 1865, the 1st Shawnee Chief and Council petitioned William P. Dole, the Commissioner of Indian Affairs, to use his influence to have the proposed Treaty of 1864, then pending in the Senate of

the United States, amended by striking the clause authorizing the sale of Shawnee Mission land, as contained in Article 5 of the Treaty. Reasons for this petition were offered as follows:

1st. Because said sale would be in conflict with and in violation of vested rights acquired under the stipulations of certain contract made by virtue of the authority of said 6th Section of the treaty of 1854 by the Commissioner of Indian Affairs with the Missionary Society of the Methodist Episcopal Church.

2nd. Because we as a tribe desire to act in good faith towards said Church or its assigns believing that said church has to the best of its ability fulfilled its part of said contract—

3d. Should the said land be sold as provided in said treaty, Thomas Johnson would be the sufferer. Mr. Johnson has spent near 26 years of the prime of his life in teaching us and our children: 18 years of which was without pay from us or the United States.

4th. It was the wish and intention of our tribe at the time of making said treaty of 1854 to give said Johnson said three sections of land.

5th. We did not desire the insertion of said clause in said treaty of 1864, but were advised contrary to our wishes to assent thereto—

6th. We do not believe that said land would sell for a sum sufficient to pay for the improvements made by said Church upon said land, thereby leaving the tribe in debt.

Having been informed that there is a balance due and unpaid to said Johnson as the agent or

> assignes (sic) of said Church, for keeping a school in pursuance of the Contract made on the 5th day of March 1855, we would respectfully request your Honor to settle with and pay said Johnson any balance that may be found due.

On April 3, 1865, James P. Usher, Secretary of the Interior, approved the payment of $5,500 to the Administrator of Thomas Johnson's estate, pursuant to the contract of March 5, 1856.

On April 6, 1865, James P. Usher, Secretary of the Interior, instructed William P. Dole to forward the application of the heirs of Rev. Johnson to the General Land Office and authorized the issuance of a patent for three sections of land due Johnson under the Treaty of May 10, 1854.

William P. Dole, Commissioner of Indian Affairs, followed the instructions of Secretary Usher and instructed J. S. Wilson by letter to authorize the issuance of a patent.

On April 18, 1865, President Andrew Johnson approved and signed a land patent which states, in part:

> *Whereas,* in the 2d and 6th Articles of the Treaty concluded on the 10th day of May, A.D. 1854, between the Commissioner on the part of the United States, and the Delegates of the United tribe of Shawnee Indians, provision is made for setting apart to the Missionary Society of the Methodist Episcopal Church South to include the improvements of the Indian Manual Labor school, three sections of land and for the confirmation of the grant to said society, or to such person or persons as may be designated by it, by Patent, from the President of the United

States upon the conditions mentioned in said 6th Article.

And Whereas, a return bearing date April 11th, 1865, from the office of Indian Affairs, Department of the Interior, has been deposited in the General Land Office, whereby it appears that the "Rev'd Thomas Johnson, now deceased, was designated by said society as the person to whom the Patent for said three sections of land should issue under the provisions of the 6th Article of said treaty." And that the Secretary of the Interior under date April 7th, 1865, has decided that the Patent should be issued to the said Thomas Johnson, the selection constituting the said three sections having been made in subdivisional tracts, and described as follows, to wit:

. . .

The South Half of the Southwest Quarter of Section 3, containing 80 acres.

The North Half of the Southwest Quarter of Section 3, containing 80 acres.

. . .

[A]ll being in Township 12 South of Range 25 East of the 6th Principal Meridian in the State of Kansas, which selection was approved by the Secretary of the Interior November 2, 1857.

Now Know Ye, that the United States of America, in consideration of the premises, and in accordance with the directions of the Secretary of the Interior, Have Given and Granted, and by these presents, do give and grant unto the said Thomas Johnson and to his heirs, [all] tracts of land above

described. To Have and to Hold the said tracts of land, with the appurtenances, unto the said Thomas Johnson and to his heirs and assigns forever.

On May 26, 1865, the above-described patent was filed, and the heirs of Thomas Johnson became the legal owners of the Shawnee Manual Labor School property, which includes that area now sought by plaintiff.

Above are the uncontroverted facts. Petitioner now seeks to deny these facts. They should not be allowed to do so.

The record established at the district court is accurate and was unchallenged. The 10th Circuit relied on that record. Petitioner's challenge to the record now after four and a half years of litigation is wrong.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

The Tenth Circuit Court Of Appeals Correctly Applied Well Established Indian Law To The Unique And Uncontroverted Facts Of This Case And Found The Land Patent Of April 18, 1865 To Be Valid.

A. The Land Patent Was Issued In Conformity With The Treaty Of May 10, 1854.

The Treaty of May 10, 1854, between the United States and the Shawnee Tribe of Indians is the foundation of the Tenth Circuit's decision. Petitioner would have the Court rewrite the treaty, for nothing in the treaty supports their position.

Article 2 of the treaty, as amended, is one of the most important in the treaty. In this article, the United States ceded to the Shawnee Indians 200,00 acres of land to be selected between the west boundary of the state of Missouri ". . . and a line parallel thereto, and west of the same, thirty miles distant; which parallel line shall be drawn from the Kansas River, to the southern boundary line of the country herein ceded; . . ." The southern boundary of the country ceded was a line beginning 28 miles south of the mouth of the Kansas River and running due west for 30 miles.

After describing the land ceded, Article 2 provides the method by which the land was to be divided among the Indians and other interested parties. With the exception of the Black Bob settlement and the land held

for the Absentee Shawnee Indians, later forfeited by reason of their continued absence and nonaffiliated with the Shawnee Tribe (see Joint Resolution of Congress, No. 9, April 7, 1869 (16 Stat. 53)), the Shawnee Indian lands were not expected to be held in common.

Instead of a compact reservation, individual Indians or the heads of families were to select plots of 200 acres per individual or 200 acres per family member. In the case of *In re Kansas Indians* (sometimes referred to as *Blue Jacket v. Com'rs. of Johnson Co.*), 71 U.S. 737, 5 Wall. 737 (1866), the court stated:

> This treaty was peculiar in some of its provisions. It did not contemplate that the Indians should enjoy the whole tract, as the quantity for each individual was limited to two hundred acres. The unselected lands were to be sold by the government, and the proceeds appropriated to the uses of the Indians.

Prior to the selection of land by the Indians, there was first to be a survey. Still prior to the Indian selection, lands were to ". . . first be set apart to the Missionary Society of the Methodist Episcopal Church South, to include the improvements of the Indian Manual Labor School, three sections of land; . . ." Other religious organizations were also designated to receive land.

Once the survey had been completed and the churches had selected their property, the Indians were to select their land. The treaty specifically provides, ". . . that all tracts of land, in this article assigned, or provided to be assigned or selected, shall be assigned and selected according to the legal subdivisions of United States lands,

and according to the laws of the United States respecting the entry of public lands, so far as said laws are applicable; and no portion of this instrument shall be so construed as to nullify or impair this stipulation."

Not everyone was given an equal amount of land, or land which petitioner would describe as "Indian Land." Some Shawnee Indians had settled on land west of the new parallel line, and they were permitted to select their 200 acres per individual on the sites they had already improved. In addition, two Shawnee Indian leaders, Joseph Parks and Black Hoof, were permitted, by Article 7, to acquire more land than normally would have been received. Though there were these exceptions, distribution of these public lands was in accordance with the laws of the United States.

Article 6 of the treaty is another key provision. It states, in part, "The grants of land above made to missionary societies and churches, shall be subject to these conditions: The grant to the Missionary Society of the Methodist Episcopal Church South, as the Indian Manual Labor School, shall be confirmed to said Society, *or to such person or persons as may be designated by it,* by patent, from the President of the United States, upon the allowance to the Shawnees, by said society, of ten thousand dollars, to be applied to the education of their youth; which it has agreed to make." (Emphasis supplied.)

Other religious organizations—the Baptists and the Quakers—were allowed to hold their land described in Article 2 only so long as the schools thereon were maintained. When the property given to the Baptists and Quakers was no longer used for school purposes, the lands were to be sold as public lands, with the funds being distributed among the Indians, pursuant to treaty. How-

ever, the churches were to be reimbursed for any improvements to the land.

Pursuant to the Treaty of May 10, 1854, three sections of farmland were set aside for the Missionary Society of the Methodist Episcopal Church South. These three sections include the disputed property. Said Missionary Society conveyed its interest in two of the three sections of Rev. Johnson and his heirs on April 26, 1856, by way of gift and sale. The last section of land was later sold to Rev. Johnson on April 18, 1861, by the Missionary Society. As of April 19, 1861, the Rev. Johnson had at least an equitable title in fee simple absolute to three sections of land in Johnson County. Under the Treaty of 1854, Rev. Johnson had the right to three sections of land. This right included the ability to pass, through inheritance, real property to his heirs—in this case, a widow and seven children. As noted in respondent's statement of the case Rev. Johnson attempted to secure a patent for the land in question. In October of 1862 he began his attempt to secure a land patent from the government for the property he already possessed pursuant to the contract. However, due to suspicions concerning his loyalty to the Union, his requests were denied. Rev. Johnson was murdered on January 2, 1865, prior to the end of the civil war and prior to the issuance of a land patent. It was his children who pressed the government for and received a patent to the land in question.

The intent of the Treaty of May 10, 1854, is found within the four corners of the document and its contemporaneous interpretation and implementation. As seen within this context, there were four distinct classes of land created by the treaty. First, individual Shawnee Indians could claim a specific amount of land based on the numbers or political influence of a particular family

household. Second, specific amounts of land contiguous in nature could be selected for or by certain bands of the Shawnee Tribe. Such selection was made on behalf of the Absentee Shawnee Indians, who never did live in Kansas or rejoin the main Shawnee Tribe and who now bring suit. Third, grants of land were made to missionary societies and to a federal agency. Fourth, it was expressly anticipated within the treaty that there would be surplus land not claimed by the Indians. Said land, which was either not selected by individual Indians, or never claimed by a particular band, as in the case of the Absentee Shawnee (see, Congressional Resolution #9, April 7, 1869 (16 Stat. 53)), could be sold by the federal government. In addition, Missionary lands, under certain circumstances, could become, in effect, surplus lands, and be sold by the federal government.

As to the land in question, it was not then, nor can it now be considered, "Indian Land." A review of Article 2 of the treaty shows why this must be true. All of the 200,000 acres ceded to the Shawnees were to be surveyed in accordance with the laws of the United States. After said survey, land for the various mission societies was to be set aside first, thus, protecting any improvements the societies had made on land. Afterward, individual Shawnee Indians or Shawnee Indians who wished to hold land in common could select a specific amount of land, including, of course, their improvements, based on either the number of family members in a household or on specific terms of the treaty. (See, Article 7.) The treaty specifically anticipated that after this division of land, there would be surplus remaining. Portions of said surplus were assigned to the Absentee Shawnee Indians with the same limitations and provisions as the members of the Shawnee Tribe then in Kansas. The

Absentee Shawnee land was to be held for five years and then, when not claimed, sold by the United States. In essence, Article 2, in conjunction with Article 6, provide that any land not selected and patented to any individual Shawnee Indians, or to bands which exercised their option to land, was to be considered as surplus and sold by the federal government. In addition, Missionary lands were subject to sale.

It is very important to note that Article 2 specifically provides in its last sentence that *"the said Indians hereby cede, relinquish, and convey to the United States all tracts or parcels of land which may be sold or are required to be sold in pursuance of any article of this instrument."* The land in question was part of the Mission grant. It was not selected either by individual Shawnee Indians, nor by any band of Shawnee Indians. It was land which the Shawnee Indians by treaty, ceded to the United States of America for consideration.

Support for this proposition is seen within the treaty itself. The land in question was part of the land granted to the Mission Society of the Methodist Episcopal Church South. Said Society agreed to pay the Shawnees $10,000 for said land. The historical record shows the Mission Society of the Methodist Episcopal Church South, pursuant to treaty, conveyed its interest in the three sections of land granted to it by the treaty to the Rev. Thomas Johnson and his heirs. The historical record further shows the Shawnees did receive the $10,000 for educational purposes promised to them by treaty. The land in question was, in fact, sold to the Rev. Thomas Johnson. As such, pursuant to the Treaty of May 10, 1854, any right or title to said property which the Indians may have had were ceded to the United States of America in exchange for $10,000.

It is a simple, conclusive fact the land in question was not then, and could not now be construed as "Indian Land." The only interest the Shawnee Indians could have had in the land in question would be receiving a portion of the proceeds of the sale of such land for educational purposes, which, in fact, they did receive. Such land is not "Indian Lands." In the case of *Walker v. Henshaw*, 83 U.S. 436 (1873), the Court specifically held that surplus lands of the Shawnee Treaty of May 10, 1854, were "public lands." The *Walker* case, while it does not deal with Mission land, clearly shows that specific parcels of land not claimed for settlement by the Shawnees, pursuant to the Treaty, were regarded after 1858 as public lands.

B. The Land Patent Was Issued In Conformity With The Laws Respecting Entry On Public Land.

Contained within Article 2 of the Treaty of 1854 is a provision which states: "It is agreed that all tracts of land, in this article assigned, or provided to be assigned or selected, shall be assigned and selected according to the legal subdivision of United States lands, and according to the laws of the United States respecting the entry of public lands, . . ." Pursuant to the laws in effect at the time of Rev. Johnson's death, a land patent could be issued to a person who had, subsequent to the filing of proof, died as did Rev. Johnson.

It was the law of the United States from 1836 to 1976 that: "Where patents for public lands have been or may be issued in pursuance of any law of the United States to a person who has died before the date of such patent, the title to land designated therein shall inure to and become vested in the heirs, devisees and as-

signees of such deceased patentee as if the patent had issued to the deceased person during life." (See 1964 Ed. 43 U.S.C. §1152, repealed by P.L. 94-579, saving provisions provided in Sec. 701 of that public law.)

Pursuant to the above-mentioned statute, in connection with Article 2 of the Treaty of 1854, clearly a patent could be issued to Rev. Johnson and his heirs. Even if his heirs had not been mentioned in the body of the patent, they could have taken title as if Rev. Johnson had been alive.

The above-mentioned statute, 43 U.S.C. §1152, has been the subject of Court decisions, the most noteworthy of which is *Larkin v. Paugh*, 276 U.S. 431, 48 S.Ct. 306, 72 L.Ed. 640 (1928). In this case, the Indian allottee, Greyhair, had died prior to the issuance of a fee simple patent. The Court, holding that his heirs took title as if the grantee were alive, stated:

> The Supreme Court was of opinion that the fee simple patent, although actually issued after Greyhair's death, should be regarded as if issued during his life, . . .
>
> . . .
>
> The statute was in force long before homestead entries were permitted; and it has been held by this court to be applicable to patents for Indian selections made under an Indian treaty, Crews v. Burcham 1 Black, 352, 356, 17 L.Ed. 91, 92, and to patents for Indian allotments made under an Act of Congress, United States v. Chase, 245 U.S. 89, 101, 62 L.Ed. 168, 176, 39 Sup. Ct. Rep. 24. True, it uses the term "public lands," which seldom is employed as including lands selected for or allotted to Indians. But the term sometimes is used in a sense which

> includes such lands where the United States has retained the title. This is illustrated in Kindred v. Union P. R. Co., 225 U.S. 582, 596, 56 L.Ed. 1216, 1220, 32 Sup. Ct. Rep. 780, and Nadeau v. Union P. R. Co., 253 U.S. 442, 444, 64 L.Ed. 1002, 1005, 40 Sup.Ct.Rep. 570. The question usually is one of intention, considering the nature and object of the particular statute. Here the statute is highly remedial, in that it is designed to relieve from the prior rule that a patent issued after the death of the grantee is inoperative and void. Davenport v. Lamb, 13 Wall. 418, 427, 20 L.Ed. 655, 657. Patents to Indians are not less within the reason for the statute than patents to white men; and we think its letter may and should be taken as including both, as was done in Crews v. Burcham and United States v. Chase.

Petitioner's argument that 43 U.S.C. §1152 would save the patent only if Johnson was an Indian is without legal foundation.

C. The Land Patent Was Issued With The Support Of The Shawnee Leadership.

In further support of the land patent of 1865 the Tenth Circuit took notice of the Indian petition dated January 17, 1865. In this petition, the elected officials of the Shawnee Indians argued to the Commissioner of Indian Affairs that it had been the tribe's intention in 1854 to give to Rev. Johnson three sections of land. It should be noted that the signatories to this petition include Graham Rogers, a former chief and Shawnee delegate to the regional negotiations concerning the 1854 treaty, Charles Blue Jacket, 1st Chief and interpretator for the

Shawnees in the treaty negotiations of 1854, and Levi Flint, then sheriff of the Shawnees and a signatory of the Treaty of 1854. (See *Blue Jacket v. Com'rs of Johnson Co.*, 3 Kan. 299 (1865), and *In Re Kansas Indians, supra* for details concerning the above-named individuals, as well as the operation of the Shawnee tribal government.

Support for the Shawnees' position is found in the treaty itself. The Missionary Society of the Methodist Episcopal Church South, grantee of the property which includes the land now in dispute, was given options available to no other religious group, *i.e.*, the ability to designate a person or persons to receive the three sections of land. In contrast, the Baptists and Quakers were given much smaller sections of land and were required to maintain the schools then in operation for the benefit of Indians or forfeit said land for public sale.

In addition, the Shawnee Indians were quite familiar with the concept of inheritance and even administered probate estates, albeit with tribal laws. (*See, Blue Jacket, supra,* and *Brown v. Steele,* 23 Kan. 473 (1880)). Furthermore, the deeds granted to the Indians pursuant to the Treaty of 1854 were in the form of land patents which gave the land in fee simple, although it did contain a restriction eventually revoked. However, within the restriction, the heirs of the grantee were specifically mentioned and no restriction in alienation applied to said heirs. *Blue Jacket, supra,* pp. 348, 349.

The treaty itself supports the position of Rev. Johnson's heirs in and of itself. The Court need not go into a complex analysis of the treaty to prove this point, for the Shawnees' petition of January 17, 1865, is representative of the Shawnee Tribes' position. The Shawnee Indians of Kansas supported the patent.

CONCLUSION

The respondent respectfully submits that the Writ of Certiorari prayed for in this action be denied for the following reasons: (1) The Court's prior decisions are controlling; (2) The Court below fully considered and correctly decided the issues involved in this case; (3) The unique facts of this case distinguish from the allegedly conflicting decisions cited by petitioner.

Respectfully submitted,

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